That was at the beginning of February, that is to say, about 10 months ago, and it is clear that if the plaintiff had accepted that position and gone on with his action then if he had succeeded he would by this time have been enjoying the fruits of his judgment because I have no doubt the defendants being a bank would have been able to satisfy a judgment for three thousand over dollars. Instead, however, of taking that obvious course which in addition to achieving expedition would also have had the merit of keeping down the costs, he (the plaintiff) has seen fit to appeal.

I do not wish to say a word as to what I consider the attitude of this Court should be in the converse case, that is to say, the case of an appeal against an order refusing leave to defend. I make that clear because I understand we may have to express opinions on that point later to-day. But what we are concerned with here is an appeal against an order giving leave to defend, and in my opinion both justice and policy should compel us to follow what was certainly at one time the rule of the Court of Appeal in England as would appear from the case of *Wing* v. *Thurlow*[1]. That rule was that the Court of Appeal would not interfere in such a case unless special circumstances are shown.

For myself I fail to detect any special circumstances in the present case, and in thinking that there are certainly no such circumstances which would justify us in interfering I am fortified by the observations of Mr. Justice Wills in the case of *The Electric & General Contract Corporation* v. *The Thomson-Houston Electric Co.*[2] where his Lordship said that he did not think Order 14 applied to cases raising what might turn out to be a difficult question of law. Such questions could not be satisfactorily dealt with at Chambers.

In my view, in the present case, there were not only certain issues of fact on which the parties were far from being agreed but there was also a question of law on which I would express no opinion whatsoever beyond the opinion that it was not a simple straightforward question of law.

In my view, therefore, Mr. Justice Rigby was perfectly right in allowing the appeal from the Registrar and therefore in my opinion this appeal should be dismissed with costs.

Hill J.A. and **Hepworth J.** concurred.

Appeal dismissed.

SYN LEE & CO. LTD. v. BANK OF CHINA

[C. A. (Thomson C.J., Hill J.A. and Hepworth J.) November 25, 1960]

[Penang — F.M. Civil Appeal No. 13 of 1960]

Practice and Procedure — R.S.C., 1957, Order 14 — Appeal against decision refusing defendant leave to defend.

The power to sign judgment under O. 14 applies to those cases which almost on the admission of the defendant are undefended.

Therefore where the issue was whether the respondents were the holder for value of the appellants' cheques or whether they merely held them as collector for their customer could not have been decided on the affidavit evidence and the judge refused the defendant leave to defend,

Held: the appellants were entitled to defend.

Cases referred to:—

(1) *Lloyd's Banking Co.* v. *Ogle* L.R. 1 Ex. D. 262, 263, 264.

(2) *Sutters* v. *Briggs* [1922] A.C. 1, 14.

COURT OF APPEAL.

R. Ramani (*Ng Ek Tiong* with him) for the appellant.

Eusoffe Abdoolcader for the respondent.

Thomson C.J. (delivering oral judgment): In this appeal we are concerned with another aspect of the question of appeals against orders made under Order 14.

This morning we were concerned to state our attitude in the case where there was an appeal against the decision of a Judge allowing a defendant leave to defend. This afternoon we are concerned with the converse case where there is an appeal from a decision of a Judge shutting out a defendant.

With great respect it seems to me there may have been some slight misapprehension on the part of the Assistant Registrar and on the part of the trial Judge as to the proper approach. It is not quite the same as the problem with which we are always being faced in the Chancery side of the Court of trying issues on affidavit evidence. In a case of this sort it is not a case of trying the issues on affidavit evidence, it is rather a question of deciding on affidavit evidence whether there is a moral improbability of a very high degree that the defendant can possibly succeed.

On the other hand we have to remember that the Order is there as much in the interests of defendants as in the interests of plaintiffs. It is in the interest of plaintiffs that they should be able to get prompt judgment when there is no real defence. But on the other hand it is in the interest of defendants in such cases that plaintiffs should be able to get judgments not only expeditiously but economically.

My own view is so well expressed in the words of Bramwell B. in the case of *Lloyd's Banking Co.* v. *Ogle*[1] that I do not find it necessary to go much further than to quote his words:—

> "The power to sign judgment was, in my opinion, intended to apply to those cases which almost on the admission of the defendant are undefended, and not to cases in which the defendant might reasonably say, 'I do not know if your case is well founded or not, but I require you to prove it'."

Later on his Lordship repeated that last phrase by saying:—

> "Where a guarantor *bona fide* says that he does not know that the debt is due, and that he requires it to be proved, I think the statute was not intended to operate to take that right from him."

In that connection and in relation to the present case it is helpful to note the following words of

Viscount Birkenhead L.C. in the case of *Sutters* v. *Briggs*[2]:—

"It is impossible for the drawer (of the cheque) to know whether the person, be he banker or not, who presents the cheque for payment, is a holder in his own right or a mere agent for collection".

In the present case the specific issue was whether the Bank of China was the holder for value of the appellants' cheques or whether they merely held them as collector for their customer Heng Moh & Co. My view is that that was a question that was incapable of being decided on the affidavit evidence which was before the Court, and in the circumstances I would say was beyond the category of cases to which the Order was intended to apply as described by Bramwell B. that is cases, which "almost on the admission of the defendant are undefended".

In the circumstances I would make an order setting aside the judgment which has been entered and giving the appellants leave to defend.

Order accordingly.

Solicitors: *Braddell & Ramani*; *Presgrave & Mathews.*

YONG YUEN POI v. PUBLIC PROSECUTOR

[A. Cr. J. (Thomson C.J.) December 2, 1960]

[K. L. — Selangor Criminal Appeal No. 64 of 1960]

Criminal Law and Procedure — Tactical onus — Passing to accused — Declaration for obtaining citizenship.

In this case the appellant made a declaration in 1957 for the purpose of obtaining citizenship, that he had been resident in Johore Bahru from 1950 to 1956 and in Kuala Lumpur from 1956 to 1957. He was found to be in possession of a Singapore identity card, issued in March 1950 which showed that then, and again in January 1954, the appellant had stated that his address was at two named places in Singapore, and in April 1957 that his address was in Kuala Lumpur. The learned Magistrate accepted as *prima facie* evidence that it was not true that from 1950 to 1957 the appellant had been resident in the Federation, and convicted the appellant.

Held: in the circumstance of the case the tactical onus passed to the appellant to explain away the entries on his identity card.

CRIMINAL APPEAL.

Robert Hoh for the appellant.

B. T. H. Lee (Deputy Public Prosecutor) for the respondent.

Thomson C.J. (delivering oral judgment): There is no doubt as to the universal truth of the proposition that in every criminal case the duty lies upon the prosecution in one way or another to prove the case against the accused person beyond reasonable doubt. In practice, however, the situation very commonly arises in a criminal prosecution that evidence is produced for the prosecution which unless it is contradicted or weakened or explained away in some manner by the defence will justify the conviction of the accused person. In that sense it can be said that what we call the tactical onus has passed to the accused. In other words, if he does not deny and if he does not explain away then the Court is entitled and in some cases is obliged to convict him.

That is just what happened in this case. The appellant made a declaration before the appropriate functionary for the purpose of obtaining citizenship that he had been resident in Johore Bahru from 1950 to 1956 and in Kuala Lumpur from 1956 to 1957, which was in the year in which he made his declaration. He was then somehow or rather found to be in possession of a Singapore registration card which had been issued in March 1950. That in itself might not have amounted to a very great deal but an examination of the card showed that in March 1950 the appellant had stated that his address was at 51, Lincoln Road, Singapore, that in January 1954 he had stated that his address was then at Boon Tiong Road and that on 24th April, 1957, he stated that his address was at 31, High Street, Kuala Lumpur. To my mind the Magistrate was right in accepting that as *prima facie* evidence that it was not true that from 1950 to 1957 the appellant had been resident in the Federation. After all the requirement is continuing residence. The position then was that the tactical onus passed to the appellant to explain away the entries on his identity card. It was not one entry that wanted explaining away; it was three entries that needed explaining away. He made no attempt to do so.

The appeal against conviction is dismissed.

Appeal dismissed.

Solicitors: *Eugene Lye & Hoh.*

MAANI v. MOHAMED

[A. C. J. (Ismail Khan J.) December 6, 1960]

[Seremban — Civil Appeal No. 6 of 1960]

Land Laws — Customary Law — Small Estates Distribution Ordinance, 1955, s.12 — Distribution of property according to customary rule — Personal law.

This was an appeal from an order of the Collector upon an application for the distribution of a small estate consisting of two pieces of land according to customary rule.

Held: the Collector should rehear this case and consider the personal law of the deceased and any local custom forming part thereof and for that purpose to require the attendance of all persons such as the lembagas who may be able to give evidence regarding any custom applicable to his estate of the deceased. *Re Haji Mansur bin Duseh*[1] and *Sali* v. *Achik*[2] considered and followed.

Cases referred to:—

(1) *Re Haji Mansur bin Duseh* [1940] M.L.J. 110.
(2) *Sali binti Haji Salleh* v. *Achik* [1941] M.L.J. 14.
(3) *Haji Hussin* v. *Maheran* [1946] M.L.J. 116.

CIVIL APPEAL.

Parties in person.

Ismail Khan J.: This is an appeal from the order of the Collector upon an application for the distribution of a small estate consisting of two